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ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SANTA FE ENGINEERS, INC.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

WALTER A. I. WILSON
Kilcullen, Wilson and Kilcullen
Chartered
1800 M Street, N.W.
Washington, D.C. 20036
(202) 296-5700

Counsel for Petitioner

Of Counsel:

Robert J. Martinez
Joanne Becker
Kilcullen, Wilson and Kilcullen
1800 M Street, N.W., 600N
Washington, D.C. 20036
(202) 296-5700

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QUESTIONS PRESENTED

1. Whether certification of a claim pursuant to section 6(c)(1) of the Contract Disputes Act of 1978 is a jurisdictional prerequisite to direct appeal to the Court of Claims under section 10 of the Act?

2. Whether a contractor's failure to certify its claim under section 6(c)(1) of the Contract Disputes Act of 1978 prior to the issuance of the final decision by the contracting officer precludes the contractor from thereafter making an election to proceed to the Court of Claims under sections 10 and 16 of the Act?

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v.

THE UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner Santa Fe Engineers, Inc. respectfully prays for a writ of certiorari to the United States Court of Claims to review that court's orders of June 4, 1982 and July 16, 1982, in *Santa Fe Engineers, Inc.* v. *United States*, No. 309-81C.

OPINION BELOW

The orders issued by the United States Court of Claims on June 4, 1982 and on July 16, 1982, from which review is sought by this petition, are not yet officially reported. The order of June 4, 1982, is included in the Appendix as Exhibit A. The order of July 16, 1982, issued pursuant to petitioner's request for reconsideration, is included in the Appendix as Exhibit B.

JURISDICTION

The initial order to which petitioner filed its Motion for Reconsideration was issued on June 4, 1982. The Order of the

United States Court of Claims responding to petitioner's Motion for Reconsideration was entered on July 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1) and 28 U.S.C. §2101(c).

STATUTE INVOLVED

This case involves sections 6, 7, 10, 12 and 16 of the Contract Disputes Act of 1978, 41 U.S.C. §§601 note, 605, 606, 609, 611. These statutory provisions are included in the Appendix as Exhibit C.[1]

STATEMENT OF THE CASE

Petitioner, Santa Fe Engineers, Inc., is a general contractor involved in the construction of projects primarily for the United States Government. On June 4, 1976, the Naval Facilities Engineering Command ("NAVFAC") awarded petitioner Contract No. N62 474-75-C-6276 for the construction of a hospital and related support facilities in Bremerton, Washington. The contract included the then standard disputes clause (1964 June). Ex. D.

During the course of the project, a number of disputes arose concerning the interpretation of the contract's plans and specifications. In an effort to avoid costly individual litigation of each one of these disputes, the parties agreed, in early 1978, to suspend resolution of all current and future disputes until the end of the job, when petitioner was to present all disputes in one overall claim.

In accordance with this agreement, petitioner, on March 17, 1980, submitted its overall claim (hereinafter referred to as its "Global Claim") on the project to the contracting officer. This Global Claim encompassed claims which had previously been the subject of contracting officers' final decisions[2], along with

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[1] Hereinafter, Exhibits in the Appendix are referred to as "Ex.___".

[2] There were eighteen (18) such claims included in the Global Claim. For six of these claims, the contracting officer denied petitioner's request for relief in final decisions issued prior to March 1, 1979, the effective date

several "new disputes"[3] for which final decisions had not been issued. The Global Claim did not at that time contain the certification language of section 6(c)(1) of the Contract Disputes Act of 1978 ("the Act").[4]

Between its submission on March 17, 1980 and the issuance of Final Decision 81-7 on January 9, 1981, petitioner's Global Claim was analyzed by government officials and was the subject of negotiations between petitioner and respondent. Additionally, the claims and disputes were subjected to audit by Defense Contract Audit Agency auditors. When attempts to settle the disputes failed on November 18, 1980, petitioner requested a final decision from the contracting officer and advised respondent that it intended to appeal the final decision directly to the Court of Claims under the Contract Disputes Act. Ex. E. At no time during this period did respondent request a certification pursuant to the Contract Disputes Act.

On January 9, 1981, the contracting officer essentially denied petitioner's Global Claim, including the "new disputes", in Final Decision 81-7.[5] Ex. F. In so doing, the contracting officer advised petitioner of its appeal rights with the following language:

> This is the Final Decision of the Contracting Officer. Decisions on disputed questions of fact and other questions that are subject to the procedure of the Disputes Clause may be appealed in accordance with the provisions of the Disputes Clause. . . . *You are also advised that under the Contract Disputes Act of 1978,*

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of the Contract Disputes Act of 1978. The other twelve claims were decided adversely to petitioner in final decisions rendered after March 1, 1979. In anticipation of a future consolidated action on these claims, petitioner appealed each of these final decisions to the Armed Services Board of Contract Appeals (ASBCA) and then (pursuant to an agreement reached with the Government) had each appeal dismissed without prejudice.

[3]These "new disputes" included several subcontractor claims and the overall impact claim for the project, and were priced at several million dollars.

[4]Petitioner was at that time still proceeding under the contract's disputes clause which did not require that claims be certified. The Global Claim did, however, contain the DD Forms 633 "Truth in Negotiation" certification.

[5]The contracting officer granted $147,580 on the total claim of $18,319,453.

> *Public Law 95-563 (codified at 41 U.S.C. §601, et. seq.), you may elect to have your appeal processed pursuant to the provisions of that Act.* (Emphasis added.)

In accordance with this language and under the authority of sections 10 and 16 of the Contract Disputes Act, petitioner then appealed Final Decision 81-7 to the United States Court of Claims by filing a petition on May 5, 1981. The petition sought direct access to the Court of Claims for a *de novo* review of that final decision.

On November 23, 1981, respondent filed a Motion For Summary Judgment in which it argued that the court had no jurisdiction to consider the "new disputes" decided by Final Decision 81-7 because they had not been certified in accordance with section 6(c)(1) of the Act.[6] Petitioner responded to this Motion For Summary Judgment on January 12, 1982, by asserting that the lack of certification of the "new disputes" was not a bar to the court's exercise of jurisdiction under the Act.[7] Petitioner requested that the court hold that it had jurisdiction over all of the claims included in the petition under the "direct access" provisions of the Act and that it determine that it was the proper forum for disposition of all the claims.

On February 24, 1982, the Court of Claims issued its decision in *Paul E. Lehman, Inc.* v. *United States*, 230 Ct. Cl. _____, 673 F.2d 352 (1982), for the first time indicating the significance which it intended to attach to the certification language of the Act. Thereafter, on April 8, 1982, petitioner provided respondent with an appropriate certification of its Global Claim.

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[6] Respondent also argued that petitioner had elected to proceed under the disputes clause of the contract instead of under the Act with respect to the 18 claims originally filed at the ASBCA, *see* note 2, *supra*, and that Final Decision 81-7 was not a reconsideration of those original 18 claims. However, those arguments are not relevant to the grounds for granting petitioner's request for a writ of certiorari with respect to the "new disputes."

[7] Petitioner also opposed respondent's other arguments.

On June 4, 1982, the Court of Claims issued an order wherein it granted respondent's motion for summary judgment to the extent that the petition was dismissed without prejudice.[8] In so doing, the court declined to decide which, if any, of the claims, including the "new disputes", were properly before it under the Act, and whether any of the claims could be transferred to the ASBCA under section 10 of the Act.

In response to this order, petitioner on June 18, 1982, filed a Motion For Reconsideration in which it requested, *inter alia*, that the court transfer the "new disputes" to the ASBCA pursuant to section 10(d) of the Contract Disputes Act.[9] Respondent opposed petitioner's request by motion filed on June 28, 1982.

By order dated July 16, 1982, the Court of Claims disposed of these motions by stating that it would take "no position whatsoever" on the status of the "new disputes." The court did state, however, that "[b]ecause plaintiff did not certify the new parts of its so-called 'global claim', [it] had no 'direct access' to this court on those aspects of that claim under [the Act].[10] Accordingly, the court did not transfer the new claims to the ASBCA under section 10(d) of the Act.

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[8]The court determined that five or six of the original 18 claims formerly appealed to the ASBCA, *see* note 2, *supra*, had been decided by the contracting officer prior to March 1, 1979, and had not been reconsidered in Final Decision 81-7. For this reason, the court held that these "pre-Act claims" were not subject to the Act and could not be consolidated for review at the court.

[9]Unlike the original 18 claims described in note 2, *supra*, the "new disputes" had never been formally docketed at the ASBCA prior to the submission of the petition at the Court of Claims, because of petitioner's election to take them directly to the Court of Claims under the "direct access" provisions of the Act.

[10]The court cited *Paul E. Lehman, Inc.* v. *United States*, 230 Ct. Cl. ____, 673 F.2d 352 (1982) as support. That decision, as clarified in *W. H. Moseley Co.* v. *United States*, 230 Ct. Cl. ____, 677 F.2d 850 (1982), *petition for cert. filed*, 50 U.S.L.W. 3998.20 (U.S. June 21, 1982) (No. 81-2323), holds that certification of claims under section 6(c)(1) of the Act is a jurisdictional prerequisite to direct access to the Court of Claims under the Act.

This refusal by the court to exercise its jurisdiction over petitioner's claims is the basis of this petition.

Since the issuance of the court's order of July 16, 1982, petitioner has attempted to proceed with all of its claims at the ASBCA. To date, however, it is not clear whether the Board will assume jurisdiction over any of the "new disputes" decided in Final Decision 81-7.[11] Should the Board decline to assume jurisdiction over these new claims, petitioner will not only have lost its right to litigate at the Court of Claims, but will be denied its substantial right to a resolution of these disputes in any forum.

REASONS FOR GRANTING THE WRIT

I.

NATIONAL IMPORTANCE OF THE ISSUES

The Contract Disputes Act implements a new disputes procedure to be followed by contractors and the government in resolving claims relating to government contracts. This new procedure is mandatory for all contracts awarded on or after March 1, 1979. The new procedure is also applicable, at the election of the contractor, to all claims decided after March 1, 1979, which arise out of contracts awarded prior to that date.[12] Accordingly, the Act affects an innumerable number of contractors and claims.

Prior to the Act, government contracts contained a "disputes" clause requiring that the parties proceed with their contract disputes through administrative channels. Under this clause, a contractor wishing to challenge a contracting officer's final decision was required to appeal that decision to

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[11] Respondent, by motion filed on August 3, 1982, has requested that petitioner's new claims be dismissed at the Board as untimely filed.

[12] With respect to pre-March 1, 1979 contracts, section 16 of the Act provides that "[T]he contractor may elect to proceed under this Act with respect to any claim pending then before the contracting officer or initiated thereafter." Contract Disputes Act of 1978, Pub. L. No. 95-563, §16, 92 Stat. 2391, 41 U.S.C. §601 note (Supp. IV 1980).

the agency's administrative board of contract appeals. Access to the Court of Claims was available only after completion of the administrative board process, for a limited review of that board's decision. Wunderlich Act, §§ 1, 2, 41 U.S.C. §§321-22 (1954).

The Act has significantly expanded the alternatives available to contractors for processing disputes. Of special importance to this case is section 10 of the Act which gives contractors the option of appealing final decisions of the contracting officer directly to the Court of Claims, rather than to the administrative board. 41 U.S.C. §609(a)(1). This "direct access" option, one of the keystones of the entire reform system established by the Act, was intended to assure contractors of "a full judicial hearing on a claim they deem important enough to warrant the maximum due process available under our system."[13]

Through its decisions in *Lehman* and subsequent cases[14], the Court of Claims has unreasonably and unnecessarily limited its jurisdiction under the direct access provision of the Act. The result is to deny contractors, like petitioner, of a forum in which to litigate legitimate claims.

II.

COURT OF CLAIMS' INTERPRETATION IS NOT SUPPORTED BY THE PLAIN LANGUAGE OF THE ACT

In dismissing the "new disputes" in petitioner's "direct

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[13] S. Rep. No. 1118, 95th Cong., 2d Sess. 12, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5246.

[14] *Paul E. Lehman, Inc.* v. *United States*, 230 Ct. Cl. ____, 673 F.2d 352 (1982); *Tri-Central, Inc.* v. *United States*, Ct. Cl. No. 275-81C (order entered March 23, 1982); *W. H. Moseley Co.* v. *United States*, 230 Ct. Cl. ____, 677 F.2d 850 (1982), *petition for cert. filed*, 50 U.S.L.W. 3998.20 (U.S. June 21, 1982) (No. 81-2323); *Parrino Enterprises* v. *United States*, Ct. Cl. No. 481-81C (order entered June 4, 1982); *Troup Bros., Inc.* v. *United States*, Ct. Cl. No. 622-80C (order entered June 8, 1982); *J&L Janitorial Services, Inc.* v. *United States*, Ct. Cl. No. 567-81C (order entered July 16, 1982); *Skelly and Loy* v. *United States*, No. 8-82C, slip op. (Ct. Cl. Aug. 11, 1982).

access" suit for lack of jurisdiction, the Court of Claims relied upon its decision in *Lehman*. *Lehman* held that:

> [U]nless a claim has been *properly certified*. . .there is simply no claim that this court may review under the act. (Emphasis added.)

673 F.2d at 355. As further defined in *Moseley*, "properly certified" means certified prior to the issuance of the contracting officer's final decision. 677 F.2d at 852. *Moseley* also makes it clear that the court considers certification prior to the issuance of a final decision to be a jurisdictional prerequisite to obtaining direct access to the Court of Claims under the Act.

The plain language of the Act simply does not support this Court of Claims' interpretation of the certification requirement. The claims submission process is covered by section 6(a) of the Act. 41 U.S.C. §605(a). That section merely requires that claims be in writing, that they be submitted to the contracting officer for a decision, and that each such claim be subject to a final decision which states the reasons therefor and informs the contractor of his rights under the Act. There is *no* mention in this section of a certification requirement, and *no* requirement that certification be provided prior to the issuance of a final decision.

The Act's certification requirement appears two paragraphs later in section 6(c) which deals with the time frame for issuing a final decision. Section 6(c) of the Act advises a contracting officer that he has sixty (60) days in which to issue a final decision or notify the contractor of the time period within which a decision will be issued after receiving a certified claim of over $50,000. There is no indication in this section that certification is a jurisdictional prerequisite. In this context, certification is a procedural device which triggers the running of the sixty (60) day period. Such a procedural requirement, which clearly benefits the government, can be waived. *See McGowan* v. *Parish*, 237 U.S. 285, 294 (1915); *Centex Construction Co.* v. *United States*, 162 Ct. Cl. 211 (1963).[15]

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[15] In *Lehman*, 673 F.2d at 356, the court stated that the certification requirement could not be waived by the contracting officer. In so stating,

Moreover, at least one other section of the Act indicates that it is section 6(a), and not section 6(c) which determines the requirements for a claim. Section 12, concerning *Interest*, reads in pertinent part as follows:

> Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives that claim *pursuant to section 6(a)* from the contractor until payment thereof. 41 U.S.C. §611 (emphasis added).

Again, section 6(a) makes no reference to certification. Yet, the above quoted language in section 12, together with the holdings in *Lehman* and *Moseley*, results in the illogical conclusion that interest begins to run on an uncertified "non-claim" from the time of its submission even though it did not become a "claim" for the purpose of review and analysis until some time later when certification was provided. *See Brookfield Construction Co.* v. *United States*, ____ Ct. Cl. ____, 661 F.2d 159, 166, 168 (1981). Such an illogical result was clearly never intended by Congress.

Finally, section 16 of the Act states the clear intention of Congress that the Act apply, at the election of the contractor, to *any* claim initiated after March 1, 1979. 41 U.S.C. §601 note. The section in no way requires that a claim be certified, and it contains no tie-in between certification of claims and the election to pursue a claim under the Act.

In short, the Court of Claims has created such a restrictive tie-in with virtually no support from the language of the Act.

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the court cited *M-R-S Mfg. Co.* v. *United States*, 203 Ct. Cl. 551, 561-62, 492 F.2d 835, 841 (1974), which interprets the cost and pricing data submission requirement of the Truth in Negotiations Act to be non-waivable. 10 U.S. C. §2306(f). The *M-R-S* case is clearly distinguishable, however, since submission of such data is the only act required of a contractor under that statute and since that statute specifically designates the time for submission. In fact, were the cost and pricing data requirement held waivable, the Truth in Negotiations Act would be rendered a virtual nullity. By contrast, the certification requirement could have been omitted from the Contract Disputes Act without substantially impairing its purposes.

III.

COURT OF CLAIMS' INTERPRETATION IS NOT SUPPORTED BY THE LEGISLATIVE HISTORY

In holding that certification is a jurisdictional prerequisite to the consideration of any claim under the Act, the Court of Claims stated that "[t]he legislative history of the certification requirement confirms the importance Congress ascribed to it." *Lehman*, 673 F.2d at 355. In fact, however, the legislative history contains no such support. Indeed, as the court itself noted in *Lehman*, "the certification requirement was added to the bill [S. 3178] on the floor of the Senate on the day on which the Senate passed the legislation," and was never mentioned in the Committee reports which accompanied the bill. *Id.* at 354-55.[16] In light of this fact, petitioner submits that more weight has been accorded to the certification requirement by the court than was ever intended by Congress.

During the Congressional hearings on the Act, Admiral Rickover testified concerning the necessity for amending the Act to include a certification requirement. *Contract Disputes Act of 1978: Joint Hearings on S.2292, S.2787 & S.3178 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 21 (1978) [hereinafter *Joint Hearings*]. From the legislative history, it is clear that Congress considered Admiral Rickover's testimony on the certification requirement to be significant, but only with respect to the commencement of the sixty day time period for the issuance of a final decision by the contracting officer. Thus, Senator Byrd stated:

> Section 5(c) in the reported S.3178 (section 6(c) in the Act as passed by the Senate) has been *amended due to the concerns expressed by* the Department of

[16] In other words, it was a "last minute" addition. There is no indication that it was the product of careful advance study and discussion by the Committee.

> Defense, Senator Proxmire, and *Admiral Rickover* that the provisions of section 5(c), with regard to setting a time limit of 60 days after written request for a decision, were too limiting, especially for large, complex claims. The intent to this provision was to safeguard the interest of the contractor from possible unreasonable delays by contracting officers. This amendment would satisfy both concerns. The ultimate decision as to the appropriate time limit if there is a conflict by the contractor and the contracting officer will be made by the agency board after a petition by the contractor. This will safeguard the contracting officer from an arbitrary and unreasonable request from a contractor on a large complex claim and would also afford the contractor relief from possible delaying tactics of a contracting officer. [Language quoted in *Lehman* emphasized.]

124 Cong. Rec. 36266, 36267 (1978). The quoted language represents the only Congressional comment on the amendments which added the certification requirement to the Act. From the language, it is evident that the intent of Congress in including the certification requirement was not to make certification a jurisdictional prerequisite, but rather, to add flexibility to the commencement of the sixty day time period. Indeed, the comments do not even refer to a certification requirement.[17]

Moreover, Congress has not remained silent while the agencies charged with administering the Act have raised certification as an essential element of a "claim".[18] In a Report of the House Committee on the Judiciary dated May 18, 1981, the following statement concerning certification was included:

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[17] Petitioner asserts that had Congress intended for this requirement to be jurisdictional, it surely would have expressed its intention in some way.

[18] As the court noted in *Lehman*, 673 F.2d at 355, the Defense Acquisition Regulations state that "a claim is not valid until it is certified." DAR §1-314(b)(1), 45 Fed. Reg. 81402, 81406 (1980).

> When Congress enacted the Contract Disputes Act of 1978, it was understood that submission of a claim in writing to a contracting officer under section 6(a) was the starting point for interest to begin to run on a contract claim. The separate provisions of section 6(c) requiring the "certification" of a claim and its supporting data when the claim is in excess of $50,000 was intended as a condition precedent to payment but was not a delayed starting point for the interest accruing period. Certain agencies have argued that they have not "received" a claim under the Act until the necessary certification data has been submitted. This is not the correct interpretation. In fact, it often leads to an unfair result in that a contractor does not have all the necessary supportive data available to satisfy certification procedures, when he initially notifies the agency in writing of a contract claim. It is likewise impossible for the contractor, at this stage of the proceeding, to anticipate what supplemental data might be requested by the contracting officer in the course of consideration of the claim. Certification under section 6(c) should not be viewed as a prerequisite to "receipt" of a claim under section 6(a).

H.R. No. 97-47, 97th Cong., 1st Sess. 3 (1981).[19] Because these comments are made by the same committee which dealt with the Contract Disputes Act of 1978, they should be accorded substantial weight. *See, Brookfield Construction Co.*, 661 F.2d at 164. Such expressions of legislative intent support the conclusion that the certification requirement is irrelevant for purposes of jurisdiction under the Act.

IV.

COURT OF CLAIMS' INTERPRETATION FRUSTRATES THE CONGRESSIONAL PURPOSE IN PROVIDING DIRECT ACCESS TO THAT COURT

The legislative history of section 10 of the Act makes it clear that direct access to the Court of Claims was included in

[19]The bill under consideration would have amended section 12 of the Act, 41 U.S.C. §611, which is not in issue here.

the Act as a remedial measure,[20] to redress problems created by the Wunderlich Act[21] and various Court decisions.[22] Congress intended for this section of the statute to reduce confusion and delay in the resolution of disputes.[23] To a large extent, however, these goals have been frustrated by the court's determination in *Lehman* that "unless a claim has been properly certified,

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[20] S. Rep. No. 1118, *supra* note 13, provides at 12:

> Direct access to courts guarantees that, at the option of the contractor, the remedial process extends from the contracting officer to the courthouse on all aspects of a dispute. . . .
>
> *****
>
> [D]irect access should strengthen Government procurement by broadening the scope of remedies available to the contractor. . . .

[21] 41 U.S.C. §§321-22 (1954).

[22] *See e.g., United States* v. *Bianchi*, 373 U.S. 709 (1963) (reviewing court could not conduct trial *de novo* but was confined to review of administrative record and should remand to board if additional factual findings were necessary); *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966) (boards only had jurisdiction over those disputes which could be resolved pursuant to a remedy-granting clause in the contract); *S&E Contractors, Inc.* v. *United States*, 406 U.S. 1 (1972) (Government had no right of appeal from board decision).

[23] In this regard, S. Rep. No. 1118, *supra* note 13, provides at 12:

> The considerable disharmony between the administrative and judicial systems that oversee the resolution of disputes was a matter of considerable concern to the Procurement Commission. There is, at present, ongoing competition for jurisdiction of contract claims. The fact-law dichotomy under Wunderlich Act standards, judicial suspension for further administrative factfinding, and remand to the boards for a quantum determination, unnecessarily confuse and delay the resolution of disputes. Since it is unlikely that these problems could be resolved by merely granting the administrative boards "all disputes" authority, and not granting the contractor direct access, the only pragmatic answer was to do both. ***Allowing the contractor direct access to the judicial remedy, and allowing the boards to handle all claims, will cut down the present traffic between the boards and the courts, thus reducing the points of friction and eliminating delays.*** (Emphasis added.)

it cannot be considered under the statute" and cannot be reviewed by the court under the Act. *Lehman*, 673 F.2d at 355; *see also Folk Construction Co.* v. *United States*, Ct. Cl. No. 99-80C (order entered Jan. 16, 1981), *rehearing denied*, (order entered Mar. 6, 1981). The court's recent pronouncement in *Skelly and Loy* v. *United States*, No. 8-82C, slip op. (Ct. Cl. Aug. 11, 1982) is perhaps the clearest example of the unreasonable procedural burdens placed upon contractors by the *Lehman* holding.[24]

The legislative history of section 10 of the Act also makes it clear that the direct access provisions contained therein do not constitute a new waiver of sovereign immunity.[25] For this reason, the doctrine of strict construction does not apply. *E.G.*, *Brookfield Construction Co.*, 661 F.2d at 165; *Lykes Bros. S.S. Co.* v. *United States*, 206 Ct. Cl. 354, 375, 513 F.2d 1342, 1353 (1975); *see also National Electric Coil* v. *United States*, Ct. Cl. No. 79-80C (order entered on Mar. 17, 1981).[26]

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[24] In *Skelly and Loy*, the court dismissed a contractor's petition for lack of jurisdiction after finding that the contractor had not certified his post-Act claim on his post-Act contract in accordance with section 6(c)(1) of the Act. The court directed the contractor to resubmit his claim, with certification, to the contracting officer and start the procedure anew. Thus, although the contractor will have a second chance to litigate his claim, he wasted years in his good faith effort to comply with the Act. Such a result is obviously not in keeping with the Congressional intent of streamlining appeal procedures.

[25] In this regard, the legislative history states:

> The rationale of the Tucker Act, which greatly limited the doctrine of sovereign immunity, was that the government subjects itself to judicial scrutiny when it entered the marketplace, and should not be the judge of its own mistakes nor adjust with finality any disputes to which it is a party. *Direct access to court does no more than reaffirm the intent of the Tucker Act.* (Emphasis added.) S. Rep. No. 1118, *supra* note 13, at 12.

[26] In *National Electric Coil*, the court recognized that:

> The rule of strict construction of the consent to be sued is not for application when the issue to be decided is which of two consents is to be chosen as the one applicable, it being conceded that one or the other can be invoked.

In fact, in view of the remedial nature of the Act,[27] the court should have construed the language of section 10 in a liberal fashion. *See Lykes Bros.*, 206 Ct. Cl. at 375, 513 F.2d at 1353. The court's decision to restrict its jurisdiction to claims certified in accordance with section 6(c)(1) of the Act is, therefore, inconsistent with the Congressional view of the Act.

V.

COURT OF CLAIMS' INTERPRETATION IS NOT CONSISTENT WITH ITS DECISIONS IN PRIOR CASES

In holding that certification prior to the final decision of the contracting officer is a requirement for jurisdiction under the Act, the Court of Claims sets up a direct conflict with at least two of its prior lines of interpretation concerning certification and election to proceed under the Act.[28] Taken as a group, these decisions establish an inconsistent and unworkable statutory scheme which government contractors, like petitioner, must interpret at their own peril.

In *Folk Construction Co.* v. *United States*, Ct. Cl. No. 99-80C (order entered Jan. 16, 1981), *rehearing denied* (order of Mar. 6, 1981), the Court of Claims held that, where a contractor submits a claim prior to the effective date of the Act (March 1, 1979), and a final decision is issued thereafter, certification is not required for a direct appeal to the Court of

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[27] The principal purpose of the Act was to "[reestablish] principles of equitable treatment, for both the Federal Government and the Government contractors in contract disputes and claims." *Joint Hearings, supra* p. 10, at 1 (statement of Senator Lawton Chiles). This remedial purpose is confirmed by the bill's legislative history which states that the Act is to provide "a fai., balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims." S. Rep. No. 1118, 95th Cong., 2d Sess. 31, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5235.

[28] Petitioner did not request a hearing or rehearing en banc at the Court of Claims in spite of these conflicts, since it determined that the *Lehman* holding had been followed by substantially all of the judges at the court. *See* cases cited in note 14, *supra*.

Claims under the Act. *See also Brookfield Construction Co.*, v. *United States*, Ct. Cl. No. 428-80C (order entered Mar. 27, 1981). The Court of Claims attempts to distinguish *Folk* from *Lehman* on the ground that *Folk* involved claims filed before the effective date of the Act. *Lehman*, 673 F.2d at 356. However, that attempted distinction fails to explain how certification can be a "jurisdictional prerequisite" for some, *but not all* claims under the Act[29]. The basis for the Court's distinction is also not apparent from either the legislative history or the text of the Act.[30]

The other major line of cases in conflict with the *Lehman/Moseley* holding originated with the Court of Claims' decision in *Tuttle/White Constructors, Inc.* v. *United States*, 228 Ct. Cl. ____, 656 F.2d 644 (1981), a case in which the court discussed the election provision of section 16 of the Act and the direct access provision of section 10(a)(1). In *Tuttle/White*, the court held that the contractor had elected to proceed under pre-Act law by filing a notice of appeal at the ASBCA which did not mention the Contract Disputes Act. In so holding, the court acknowledged that the Act "does not set forth a specific time period within which an election to proceed under the Act must be made", but understood that a "contractor is under certain compulsions of time and choice that point to a requirement that the contractor make a positive election whether to come under the act" at an appropriate time and in an appropriate manner. *Id.* at ____, 656 F.2d at 647. As an example, the court noted that in a pre-March 1, 1979 contract situation, a contractor who decides to come under the Act and proceed directly to the court, must implement that election by filing a petition at the court within twelve (12) months of the contracting officer's final decision. The court stated specifically, however, that a contractor is under no obligation to make such an election before the expiration of the twelve month filing period. *Id.*

[29] It is noteworthy that the decision in *Folk*, the first word on this matter, was issued *after* the contracting officer rendered Final Decision 81-7.

[30] Section 16 of the Act, the election provision, makes no distinction between *Folk*-like ("pending") claims and *Lehman*-like ("initiated thereafter") claims.

The *Lehman/Moseley* requirement that claims be certified in accordance with the Act prior to the issuance of a final decision by the contracting officer is inconsistent with the rationale of the *Tuttle/White* decision. *Lehman* and *Moseley* make it clear that a contractor can no longer make a valid election to proceed under the Act by timely filing a petition directly in the Court of Claims *unless* he certified his claims prior to the issuance of a final decision. Yet, if the contractor did provide such certification to the contracting officer prior to a final decision, he could well be deemed, under the rationale of *Tuttle/White*, to have made a binding election to proceed under the Act. The ultimate effect of *Lehman* and *Moseley*, therefore, is to require contractors with pre-Act contracts to elect between pre-Act and post-Act law at the time of claim submission. This result is surely not in keeping with the court's earlier construction of the election provision in *Tuttle/White*.

Although a certification requirement and *de facto* time constraints on election may not appear manifestly unfair on their face, they are devastating to contractors, like petitioner, who had no way of knowing that their right to elect to proceed under the Act was contingent on their having certified their claims to the contracting officer.[31] This is particularly true where, as here, a court's interpretations of the provisions of a new statutory scheme are so internally inconsistent as to indicate that one or more of its lines of decision is incorrect.

VI.

INEQUITABLE DEPRIVATION OF FORUM IN WHICH TO LITIGATE CLAIMS

By restricting its direct access jurisdiction to claims certified in accordance with section 6(c)(1) of the Act, the Court of Claims has not only deprived petitioner, and all other similarly

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[31] Prior to the court's decision in *Lehman*, none of the leading commentators in the field of Government Contracts anticipated the emergence of certification as a jurisdictional prerequisite. *See e.g.*, 2 R. Nash, Jr. & J. Cibinic, Jr., *Federal Procurement Law* 2037-2041, 2083-2084 (1980); Knight, *Guidelines for Certification of Claims and Requests for Relief*, Contract Management, October 1981, at 4.

situated contractors, of the choice of forum provided by the Act, but may very well have deprived petitioner of *any* forum whatsoever in which to litigate his claims. This result is fundamentally unfair to petitioner. *See Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Atkins* v. *United States*, 214 Ct. Cl. ____, 556 F.2d 1028, 1044 (1977), *cert. denied* 434 U.S. 944 (1978).

Petitioner submitted its Global Claim to the contracting officer during the "transitional" period from the "old" disputes clause procedure to the "new" procedures created by the Contract Disputes Act. The submission of the Global Claim predated agency pronouncements on the necessity of certification,[32] as well as the Court of Claims' decisions in *Lehman* and *Moseley*. As a result, petitioner had to proceed under new and unsettled law, without the benefit of judicial, administrative or legislative guidance that certification would subsequently be deemed a jurisdictional prerequisite to proceeding under the Act.

Petitioner's determination that it could proceed under the Act, without certification, was in large part due to language in the contracting officer's final decision advising petitioner of its right to appeal under the Act. This advice, which later proved erroneous, is indicative of the government's own confusion during this transition period concerning the Act's certification requirement. To bar petitioner from proceeding under the Act because of its non-compliance with what was not at the time recognized to be a requirement, would be to hold petitioner to a higher standard of knowledge and foresight than could reasonably be expected of the agency charged with administering the Act. Yet, the Court of Claims' decisions in *Lehman* and *Moseley* would have this effect on petitioner. Indeed, the current holding of the Court of Claims in dismissing petitioner's Complaint has the effect of penalizing this contractor for failing to comply with a requirement, beneficial to the government, which the government itself had construed as non-essential.

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[32] The Office of Federal Procurement Policy issued a final regulation revising the disputes clause on April 29, 1980. 45 Fed. Reg. 31,035. The revised clause, which applies to all contracts entered into after June 1, 1980, contains a certification requirement.

The inequities involved in denying petitioner access to the Court of Claims are further exacerbated by the court's recent pronouncements in *Skelly and Loy*, No. 8-82C, slip op. (Ct. Cl. Aug. 11, 1982). In *Skelly and Loy*, the contractor failed to certify his claim pursuant to section 6(c)(1) of the Act even though his post-Act contract was automatically covered by the Act. The court held that without certification, there was no "claim", and so, no valid final decision from which an appeal could be taken. For this reason, the court directed the contractor to certify his claim, and to resubmit it to the contracting officer for an appealable final decision. Thus, in *Skelly and Loy*, the failure to certify wasted a considerable amount of the contractor's time, but did not deprive the contractor of an opportunity to litigate his claims; the contractor was, in essence, given a second chance.

By contrast, petitioner's failure to certify its "new claims" could well prevent it from ever litigating those claims. Because petitioner's claims were submitted under a pre-Act contract, the lack of certification did not automatically invalidate the contracting officer's final decision. For this reason, the holding in *Skelly and Loy* may not apply to petitioner's situation. Consequently, if the holdings in *Lehman* and *Moseley* are upheld, petitioner will not even be accorded the same substantive rights available to post-Act contractors who may re-certify and re-submit their disputes (i.e., *Skelly and Loy*)[33]; or to pre-Act contractors on pre-Act claims who need not certify at all.

Petitioner asserts that the Contract Disputes Act was enacted as a remedial statute and that, as such, it was never the intent of Congress to deny a contractor the right to have his

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[33] In a recent decision by the Board of Contract Appeals of the Department of Agriculture (AGBCA), that Board suggested that the holding in *Skelly and Loy* might be applicable to cases involving post-Act claims submitted under pre-Act contracts. Paul E. Lehman, Inc., AGBCA No. 82-241-1, slip op. at 5 (Sept. 3, 1982). To date, however, this view has not been adopted by either the Court of Claims or the ASBCA.

claims and disputes heard in any forum.[34] This is particularly true where, as in the instant case, the government's representatives were familiar with the substance of the claims for an extensive period of time, the claims had been audited and reviewed by the government prior to the issuance of the final decision, and where the contractor certified the claims, as originally submitted, when it became apparent that certification might be required. In that regard it must also be noted that the government never made a formal demand for certification, even though, well before the issuance of the final decision, it was made aware of petitioner's desire to seek direct access to the Court of Claims. Ex. D. Thus, in the instant case, the government was in no way prejudiced by petitioner's failure to submit a certification in accordance with *Lehman* and *Moseley*.

CONCLUSION

The court's interpretation of the Act's certification requirement is manifestly contrary to the text, legislative history and purpose of the Act. The interpretation has not only complicated procedures under the Act, but has deprived contractors of a forum in which to litigate their claims. Congress never intended for the Act or its certification requirement to serve as a trap for unwary contractors.

To deny petitioner its right to litigate legitimate claims because of an unanticipated and unsupportable interpretation of the Act by the Court of Claims is a fundamental denial of due process which works a gross inequity on this, and all other similarly situated, contractors.

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[34] Nevertheless, the government is currently arguing that petitioner's election to proceed before the Court of Claims, even though ineffective, precludes petitioner from now seeking resolution of those disputes before the administrative board. If the government prevails, petitioner will have been denied its substantial right to have its claims heard in *any* forum.

For the foregoing reasons, petitioner respectfully urges the Court to grant this petition for a writ of certiorari to review the orders of the Court of Claims.

Respectfully submitted,

WALTER A. I. WILSON
Kilcullen, Wilson and Kilcullen
Chartered
1800 M Street, N.W., 600N
Washington, D.C. 20036
(202) 296-5700

Counsel for Petitioner

Of Counsel:

Robert J. Martinez
Joanne Becker
Kilcullen, Wilson and Kilcullen
1800 M Street, N.W., 600N
Washington, D.C. 20036
(202) 296-5700

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